IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 80 OF 2005

MISS MARIA ALICE ALMEIDA AND ORS., ...Appellants

Versus

SMT. MARIA ANTONIETA OPHELIA ALMEIDA AND ORS. ....Respondents

Shri V.A. Lawande with Shri A. Kakodkar, Advoctes for the Appellants.

Coram:- R. M. LODHA, J.

Date:- 6th October, 2005

P.C.:

Heard Shri Lawande, learned counsel for the appellants.

2. The principal point that fell for determination before the appellate Court was whether the plaintiffs proved that they were the owners of the property comprising of Survey Nos.9/1, 9/2 and 9/4 of village Padi Taluka Quepem and Survey Nos.10/1, 10/2 and 10/3 at village Queddem, Taluka Quepem.

3. The appellate Court considered the evidence on record and held that the plaintiffs failed to established their ownership over the property under Survey Nos.9/1, 9/2 and 9/4. As regards land comprising of Survey Nos.10/1, 10/2 and 10/3, the appellants gave up their claim before the appeal Court. As a matter of fact, before the appellate Court the appellants set up entirely a new case. This is reflected from the consideration of the matter in paragraph 9 of the impugned judgment wherein the appellate Court observed thus :-

" Before the trial Court, it was the case of the plaintiffs that the suit

property comprises of survey nos. 9/1, 9/2 and 9/4 situated at Padi Village,Quepem taluka and also survey nos. 10/1, 10/2 and 10/3 ofQuedem Village, Quepem Taluka and further both the said properties are described under common Land Registration No. 5117 though the property under survey nos. 9/1, 9/2 and 9/4 bears matriz no.4 of Quepem Taluka land the property bearing survey nos. 10/1, 10/2 and 10/3 bears matriz no.17 of Quepem Taluka. Before the trial Court, it is the case of the plaintiffs that they are the owners of the entire suit property which admeasures 1,03,700 square metres. In the plaint, they have further stated that in the Survey Record pertaining to survey nos. 9/1, 9/2 and 9/4, the name of Maria Florida Torcato, the mother/mother in law of defendant nos.3 and 4 and Joaquim Floriano Almeida, the father of defendant no.1 have been wrongly recorded. It is their further case tht the properties under survey nos.10/1, 10/2 and 10/3 of Quedem Village stand in the name of father of the plaintiffs and the same has to be maintained. However, before this Court, a new case has been set up by the learned Advocate for the appellants in his written arguments. For the first time in the written arguments, the learned Advocate for the appellants states that in survey nos. 10/1, 10/2 and 10/3, the appellants have no claim at all. For the first time in his written arguments, the learned Advocte for the appellants submitted as follows :-

"Therefore, for all intents and legal status it appears that the properties belonging to the appellants and respondent nos.1 to 4 are sort of exchanged which means the name of Francisco Rosario Almeida, the father of the appellant ought to have figured under survey no. 9/1, 9/2, 9/3 and 9/4 in the property of Padi village and the name of the respondents namely Maria Florinda Torcato and Joaquim Floriana Almeida ought to have figured under survey no. 10/1, 10/2 and 10/3 in the property of Quepem Village . "

There are no pleadings of that sort before the trial Court and the aforesaid contentions of the learned Advocate for the appellants amounts to setting up a new case which has not been pleaded earlier. The entire arguments of the learned Advocate for the appellants are now based on the fact that theproperty under survey no. 10/1, 10/2 and 10/3 does not

belong to the appellants but the same belongs to the respondents. Thus, the following contentions of the learned Advocate for the appellants in his written arguments are not pleaded in the suit and are in fact contrary to the earlier pleadings:-

"Taking into account the southern boundary of the respondents' property under Matriz No.4, the property on the southern side as per Matriz records figures the names of Pancracio Antonio Dias whcih now belong to the appellants as averred in para 13.

Therefore, the property of the appellants fall on the southern side of the respondent's property and the appellants property bears survey no. 9/1, 9/2, 9/3 and 9/4 of Padi Village but however this is wrongly surveyed in the name of Maria Florida Torcato and Joaquim Floriano Almeida in the same manner the properpty under survey no. 10/1, 10/2 and 10/3 of Quepem Village is wrongly surveyed in the name of the father of the appellants. "

As stated above, a completely new case not pleaded by the plaintiffs has been set up by the learned Advocate for the appellants. Thelearned trial Judge has rightly come to the conclusion that the plaintiffs have failed to establish that the documents produced on record correspond to survey nos. 9/1, 9/2 and 9/4 of Padi village. "

4. The consideration of the matter by the appellate Court in affirming the findings of the trial Court do not suffer from any error of law. No substantial question of law arises.

5. At this stage the learned counsel for the appellants made a prayer for withdrawal of the suit. However, I find no justification to accede to the request of the learned counsel for the appellants for withdrawing the suit at this stage.

Second Appeal is dismissed in limine.

R. M. LODHA, J.

sl.